

**Letter of Findings Number: 04-20100348**  
**Use Tax**  
**For Tax Years 2007-08**

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**ISSUE**

**I. Use Tax—Imposition.**

**Authority:** Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158 (Ind. Tax Ct. 1995); IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax regarding items stored in Indiana.

**STATEMENT OF FACTS**

Taxpayer is an Indiana corporation. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had purchased tangible personal property and used it in Indiana without paying sales or use tax on those purchases. The Department therefore issued proposed assessments for use tax and interest for the tax years 2007 and 2008. Taxpayer disagreed with a portion of the items which were subjected to use tax. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Use Tax—Imposition.**

**DISCUSSION**

Taxpayer protests the imposition of use tax on promotional items it purchased and distributed exclusively at out-of-state conferences. The promotional items include items such as, but not necessarily limited to: books and pamphlets, name badge holders, lanyards, totes, and tee shirts. The Department considered, since these items were brought into Indiana, stored here, taken to another state, and then returned to Indiana, that these items were not stored temporarily and did not qualify for the temporary storage exemption. Taxpayer believes that these items do qualify for the temporary storage exemption and are not subject to Indiana use tax. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property, via storage, in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

Taxpayer refers to IC § 6-2.5-3-1(b), which states:

"Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

Taxpayer concludes that this definition and its use of the promotional items solely outside of Indiana mean that it does not "store" the promotional items in Indiana. Taxpayer also refers to the Indiana Tax Court case Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158, 1163 (Ind. Tax Ct. 1995), which states:

Miles argues that its promotional materials are excepted from use tax under the definition of "storage."

"Storage" is defined as "the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana." I.C. 6-2.5-3-1(b) (emphasis added).

The Department argues that the promotional materials are taxable under the definition of "use." "Use" is defined as "the exercise of any right or power of ownership over tangible personal property." I.C. 6-2.5-3-1(a).

Specifically, the Department contends that "Miles is liable for use tax because its storage of the promotional items in, and withdrawal of them from, its Indiana warehouses constitute the exercise of a right or power of ownership over them."

(Emphasis in original).

The court also added:

Miles is correct. This Court has previously held that the storage exception limits and qualifies the meaning of "use." *USAir, Inc. v. Indiana Dep't of State Revenue* (1993), Ind. Tax, 623 N.E.2d 466, 470. If property is stored in Indiana for subsequent use outside Indiana, then the activities of storing, handling, and transporting the property cannot be taxed as "uses." *Id.* To hold otherwise would subsume "storage" within "use," and nullify the exception for subsequent use outside Indiana.

*Id.*, at 1164.

In the instant case, Taxpayer has provided sufficient documentation to establish that the promotional items qualify for the temporary storage exemption. While the undistributed promotional items are returned to Indiana, they are then taken to another state and distributed there. This results in a series of temporary storages without Indiana "use," as provided in *Miles*.

Therefore, the promotional items qualify for the temporary storage exemption provided by IC § 6-2.5-3-1 and discussed in *Miles*. For clarification, the Department notes that this exemption only applies to the promotional items which are distributed. It would not apply to items such as booths or tables which a taxpayer "used" in other states but did not distribute. The promotional items distributed outside Indiana are "used" outside Indiana and are gone with no further potential use in Indiana. On the other hand, non-distributed items might be "used" outside Indiana but, due to their durable nature, could later be "used" in Indiana. The definition provided by IC § 6-2.5-3-1(b) only applies to tangible personal property used solely outside Indiana. The Department acknowledges that Taxpayer has not made such an argument in this case, but wanted to clarify the exemption's application. In this case, Taxpayer has met the burden imposed by IC § 6-8.1-5-1(c).

#### **FINDING**

Taxpayer's protest is sustained.

*Posted: 03/23/2011 by Legislative Services Agency*

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